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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ALBINO G. ROMERO,<br>Defendant and Appellant. | A153534<br><br>(San Francisco City & County Super. Ct. No. 224560) |

## INTRODUCTION

Defendant Albino G. Romero appeals from a judgment of conviction, following a jury trial, of forcible sodomy. He maintains the trial court erred by (1) denying his request for a *Mayberry*[1] instruction (good faith belief the victim consented) and (2) denying his motion for a new trial based on juror misconduct. We affirm.

## BACKGROUND

At the time of the sexual assault, the victim lived in San Francisco and worked in the Castro neighborhood. She was preparing to move to the East Coast, and friends had taken her out for an impromptu going away party. They went to the Beaux bar, where the victim had "quite a few" drinks. She remembered remaining at the Beaux bar with her friends, Michael and Zonia, after her friend, Ryan, left. She had no memory of trying to go to another bar, The Café, although video footage showed her and Michael trying to get in.

[1] *People v. Mayberry* (1975) 15 Cal.3d 143 (*Mayberry*).

The next thing the victim clearly remembered was being on Noe Street, on her way to Muni to get home. She believed she left her friends around 1 or 1:30 a.m., at which time the street would have been uncrowded.

She remembered a man calling out from behind her to get her attention. He caught up with her fairly quickly and kissed her. The man then made it clear she was to " 'hold still' " and not move. He began to unbutton her jeans and forcibly turned her around, pushing her against a wall. Scared the man might kill her, she did not resist or fight back. She thought her best hope to survive was to "let him do what he wanted to do."

The man forced his penis into her anus, and the victim believed he entered her for several minutes. It was "horrible" and "[p]ainful." Although she admittedly was largely in a state of alcoholic blackout, the rape was so traumatic she vividly remembered the attack. She was in "pure terror," and she "detached" to cope with the trauma.

The next thing she recalled was being on the ground, in shock, and realizing the man was gone. She tried to call friends and eventually reached a friend, who told her to call 911. When the police arrived, they found the victim lying on the ground, hysterical, and with her pants still down. She repeatedly told the officers she had just been raped.

She was taken to the hospital, where a nurse practitioner (NP) in the Rape Treatment Center conducted a sexual assault examination. The NP noted bruises and abrasions on the victim's knees and arms, as well as injuries on her back. The NP examined her genitals, anus, and rectum, finding five lacerations around the anus, which could have been caused by force. The NP also took an anal swab and two rectal swabs. Sperm cells were found on the swabs, confirming the presence of semen. The swabs were tested for DNA and yielded a profile from a single unknown male source.

After defendant became a suspect in the case, a swab taken from inside his cheek was found to be consistent with the DNA from the semen in the rectal swabs. The probability of someone other than defendant matching the DNA was one in 16.5 quintillion. Defendant was arrested shortly thereafter.

During his interview with police officers, defendant said he worked in the Castro area and often went out for drinks after work. He also often drank to a point where he

could not remember much. He believed he worked the night of the rape. He repeatedly said he did not remember the victim, nor did he recall having sex with her. When the police showed defendant a photo of the victim, he said he had no memory of ever seeing her. He acknowledged that if his DNA was inside the woman "it could be from sex," but continued to insist he did not know her.

After the jury found defendant guilty of forcible sodomy, he moved for a new trial on the ground of jury misconduct, which the court denied. The court sentenced defendant to a six-year prison term.

## DISCUSSION

### *Failure to Instruct on Good Faith Belief in Consent*

Defendant claims the trial court erred in declining to give a *Mayberry* instruction on good faith belief in consent as a defense.

On appeal, we independently review the record to determine whether there was substantial evidence to support giving a *Mayberry* instruction. (*People v. Williams* (1992) 4 Cal.4th 354, 361 (*Williams*) [trial court "must give a requested instruction only when the defense is supported by 'substantial evidence,' that is, evidence sufficient to 'deserve consideration by the jury,' not 'whenever *any* evidence is presented, no matter how weak' "].)

A *Mayberry* defense has both a subjective and an objective component. "The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent." (*Williams*, *supra*, 4 Cal.4th at pp. 360–361, fn. omitted.) The objective component "asks whether the defendant's mistake regarding consent was reasonable under the circumstances." (*Id.* at p. 361.) "Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction." (*Ibid.*) "[B]ecause the *Mayberry*

instruction is premised on mistake of fact, the instruction should not be given absent substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (*Id.* at p. 362.)

In denying the requested instruction, the trial court stated "[t]here's literally no evidence here to support the subjective component of the *Mayberry* test, because . . . the defendant told the police that he had no memory whatsoever of the alleged sexual assault." "As a result, there is no evidence whatsoever that he actually believed [the victim] had consented to sexual activity, mistakenly or otherwise, and such evidence, whether it's direct or circumstantial, is required by the case law."

Defendant acknowledges there was no direct evidence as to his belief at the time, given his statements to the police that he had no memory of any sexual encounter with the victim. He claims, however, there was sufficient circumstantial evidence to allow the jury to find he subjectively believed the victim consented. Defendant points to the victim's admitted lack of resistance, that she remembered being kissed before the attack, the fact she was earlier seen with a well-dressed man, and the fact 30-minutes elapsed between cell phone calls to her friends before the attack and the calls she made afterward. He also points to his own statement to the police, when asked why someone would perpetrate such an attack, that such a person would have to be "sick in the head" and it was "wrong." None of this evidence, separately or collectively, could support a finding defendant in fact believed, in good faith, that the victim consented to be sodomized by an unknown assailant, at night, on a public street.

Defendant maintains that because the victim did not resist, this "certainly provided circumstantial evidence that [defendant] reasonably believed she was consenting." It is hardly the case, however, that the fact a victim—after being accosted from behind, threatened to keep still, and thrown up against a wall by a stranger—accedes to the threat and does not resist, can signal consent to anal sex. (See *People v. Ireland* (2010) 188 Cal.App.4th 328, 338 [when defendant drew a knife as he commenced raping prostitutes, thereby expressly or impliedly threatening his victims, "the previously given consent no longer existed, either in fact or in law"].) Rather, it signals abject terror. It is

not "equivocal" conduct and does not begin to suggest defendant "honestly and in good faith" believed the victim consented to the conduct. Indeed, the victim testified without contradiction she did not fight back because she was afraid defendant might kill her, and she thought it was her best hope for survival.

The circumstances in *Mayberry*, in which the Supreme Court concluded the jury should have been instructed on a good faith, albeit mistaken, belief in consent, differed. (*Mayberry*, *supra*, 15 Cal.3d at p. 149.) In that case, the defendant testified he and the victim struck up a conversation after which he accompanied her to a grocery store where she purchased cigarettes, he never threatened her, she willingly walked back with him to his apartment, and she agreed to, and did, engage in intercourse with him. The defendant's brother, who was also his roommate and a co-defendant, testified he returned to the apartment while the defendant and victim were still in bed, he left again, and on his return, the victim left. (*Ibid.*) Given this testimony, the high court concluded the victim's testimony that she put on an " 'act' " of cooperating with the defendant and did not offer any resistance, "might have mislead him as to whether she was consenting." (*Id.* at pp. 156–157.) The circumstances that occurred in the instant case are not comparable. Not resisting sodomization—after being approached at night from behind by a stranger, threatened to say nothing, and thrown up against a wall—does not begin to constitute "equivocal" conduct any person could, in good faith, interpret as consent to anal sex.

Defendant similarly claims that because the victim recalled being kissed on the mouth, this was additional circumstantial evidence he had received romantic signals from her, leading him to believe she consented to being sodomized on a public street. Again, even assuming the kiss had any volitional aspect to it—and there is no evidence of that—it hardly needs to be said that a kiss, particularly one from a stranger who has accosted the victim at night from behind on a public street, is an invitation to sex. Furthermore, after the kiss, defendant threatened her to keep quiet, forcibly turned her around, and threw her up against a wall. At that point, the interaction became a brutal attack, and

defendant could not, in good faith, have entertained any delusion of consent to the sodomization that followed.

Defendant further maintains that because the victim was seen walking arm-in-arm with a " 'well-groomed' " Latin man, this "closed the loop in [defendant's] theory that he and [the victim] had been involved in a romantic encounter establishing a believed consent before the sexual contact." This assertion is meritless. Walking arm-in-arm with the Latin gentleman, who was the victim's friend Michael, does not permit an inference the victim was consenting to sex even with him, let alone constitute a signal to defendant she would consent to a sexual encounter with him. (See *Williams*, *supra*, 4 Cal.4th at p. 363 ["The relevant inquiry under *Mayberry* . . . is whether [the defendant] believed [the victim] consented to have intercourse, not whether she consented to spend time with him."].)

Defendant additionally claims the 30-minute time period between calls placed by the victim to friends and her calls after the rape provided "circumstantial evidence that [the victim] had time to meet [defendant] and provide him with mixed signals of consent." This supposed scenario is pure speculation. That the victim did not use her cell phone for 30 minutes says nothing about what happened during that period of time, let alone suggest she "met" with defendant and gave even a "mixed signal[]" she "consented" to a sexual encounter.

Finally, defendant maintains his own statements to the police were "strong circumstantial evidence that he believed that [the victim] had consented." He told the police he had previously had sexual encounters while he was drunk with other women, had no memory of having had sex the night in question, and had never met the victim. He also said someone would have to be "sick in the head" to perpetrate the attack that had occurred. These statements, provided five months after the attack, say nothing about what happened on the night in question. They do not purport to recount what defendant thought *at the time of the attack*, and they suggest nothing about the *victim's conduct* that could have led defendant to believe in good faith she consented to being sodomized by a stranger who accosted her at night on a public street.

In sum, the trial court correctly assessed the state of the evidence—that there was insufficient evidence defendant subjectively believed the victim consented to warrant a *Mayberry* instruction.[2]

Even if any of the evidence to which defendant points could remotely be said to constitute circumstantial evidence he subjectively believed, in good faith, the victim consented to a sexual encounter, it was manifestly insufficient to establish such belief was objectively reasonable. (See *Williams, supra*, 4 Cal.4th at pp. 361–362.)

Defendant urges that because the trial court did not address the objective prong of the *Mayberry* analysis when denying his requested instruction, this "implies" the court found the evidence was sufficient to meet it. A far more reasonable reading of the record is that the trial court found the evidence so deficient as to any subjective belief, there was no need to proceed further.

While we are inclined to take the same approach, we are compelled to point out the evidence does not, in any case, provide a tableau of "circumstances society will tolerate as reasonable" (*Williams, supra*, 4 Cal.4th at p. 361) that could elevate defendant's professed belief the victim consented to a sexual encounter that "was reasonable under the circumstances." Our society does not condone the notion that a woman, walking arm-in-arm with someone, or allowing a kiss, or being intoxicated,

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[2] Defendant criticizes the trial court's reference, while denying his instructional request, to *People v. Dominguez* (2006) 39 Cal.4th 1141 (*Dominguez*). In that case, the prosecution presented evidence the victim was beaten and strangled, suffered severe trauma to her vagina and cervix, and was killed after sexual intercourse with the defendant, whereas the defendant testified that after initially refusing, the victim consented to having sex. (*Id.* at pp. 1148–1149.) Given the "contrasting scenarios"—no consent versus express consent—the Supreme Court concluded there was " 'no middle ground' " to argue defendant "mistakenly" believed the victim had consented, and therefore the trial court had not erred in failing to give a *Mayberry* instruction. (*Ibid.*, italics omitted.) While the evidence in *Dominguez* differed, defendant overlooks that the high court also recapped the requirements for a *Mayberry* instruction, emphasizing there are two prongs to the analysis—a "subjective" belief of consent and a belief that is "objectively" reasonable. (*Id.* at p. 1148.) We therefore can discern no error on the part of the trial court in citing to *Dominguez.*

signals consent to sex. Nor does society condone the notion that going limp—in the face of threats and force by an attacker—signals consent to sex, let alone, to sodomization by a complete stranger in the wee hours of the morning on a public street. (See *Id.* at p. 363 [to suggest that the fact the victim accompanied the defendant to a hotel room after spending several hours with him and watching a hotel clerk hand a bedsheet to him, "as a basis for a reasonable and good faith but mistaken belief in consent to intercourse is . . . to 'revive the obsolete and repugnant idea that a woman loses her right to refuse sexual consent if she accompanies a man alone to a private place' "]; see also *Id.* at p. 372 (conc. opn. of Kennard, J.) ["It is indeed a rare [forcible rape] case in which the evidence would support jury findings that the defendant reasonably believed that the victim consented to sexual intercourse but that, because the victim did not in fact consent, this reasonable belief was mistaken."].)

In short, given the victim's uncontradicted testimony—that defendant approached her from behind, threatened her to keep quiet, and shoved her up against a wall, and that she was terrified and offered no resistance because she believed it was her best chance to survive—"it stretches credulity . . . to suggest the jury could have found" any belief by defendant the sexual encounter was consensual, "even if subjectively held, was objectively reasonable." (*People v. Andrade* (2015) 238 Cal.App.4th 1274, 1303.)

Accordingly, the trial court did not err in refusing defendant's proffered *Mayberry* instruction.

***Denial of Motion for New Trial***

Defendant moved for a new trial on the ground of juror misconduct, specifically, comments on the fact defendant did not testify.

Defendant submitted one juror declaration in support of his motion that stated in pertinent part: "We, the jury, did discussed [*sic*] the fact that Mr. Romero did not testify in our deliberations. We speculated that it was the attorney['s] . . . decision to make. I speculated that if Mr. Romero had testified it would have opened a can of worms. Perhaps, Mr. Romero would not completely understand the question and not answer it

correctly. Maybe he was just too nervous to testify."[3] At the hearing on the motion, defense counsel represented she had spoken with nine jurors, seven of whom stated they talked about the fact defendant did not testify.

The trial court denied the motion and thereafter issued a written order, stating counsel's assertions were not competent evidence and striking all of the remaining portions of the juror declaration under Evidence Code section 1150 as impermissible commentary on the jury's deliberative process.[4] Defendant does not challenge either evidentiary ruling on appeal. The court then found misconduct had occurred, but there was no evidence of "actual harm" to defendant. The court declined to hold an evidentiary hearing because there was "no material conflict in the evidence."

As the trial court recognized, a motion for new trial on the basis of juror misconduct is evaluated by way of a three-step analysis. First, the court must "determine whether the affidavits supporting the motion are admissible." (*People v. Dorsey* (1995) 34 Cal.App.4th 694, 703.) Second, "[i]f the evidence is admissible, the trial court must determine whether the facts establish misconduct." (*Ibid.*) Third, "assuming misconduct, the trial court must determine whether the misconduct was prejudicial." (*Id.* at pp. 703–704.)

Here, there is no issue as to the admissibility, in limited part, of the juror declaration submitted in support of his motion. It is well-established that discussion of a defendant's failure to testify is misconduct. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1426 (*Leonard*).) Accordingly, the sole issue on appeal is the third prong of the analysis—whether the misconduct was prejudicial to the defendant. " ' "Whether

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[3] The declaration was two pages in length and stated a number of other things about the jury discussions.

[4] Evidence Code section 1150 " 'distinguishes "between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved. . . ." [Citation.] ". . .The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration." ' " (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1281.)

prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination." ' " (*Ibid.*; *People v. Avila* (2009) 46 Cal.4th 680, 726–727 (*Avila*).) " ' "[W]e accept," ' " however, " ' "the trial court's credibility determinations and findings . . . if supported by substantial evidence." ' " (*Id.* at p. 727.)

Juror misconduct in discussing a defendant's failure to testify "gives rise to a presumption of prejudice, which 'may be rebutted . . . by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm.' " (*Leonard, supra,* 40 Cal.4th at p. 1425; see *People v. Lavender* (2014) 60 Cal.4th 679, 687 (*Lavender*).)

In a recent case involving such misconduct, the Court of Appeal concluded that reviewing the strength of the trial evidence is not, in this particular context, helpful in assessing prejudice, pointing out the Supreme Court has never expressly said "the 'entire record' " in this context includes the trial evidence. (*People v. Solorio* (2017) 17 Cal.App.5th 398, 408–409 (*Solorio*).) Rather, the appellate court identified the following three factors as pertinent: (1) whether the jurors drew adverse inferences of guilt from the defendant's failure not to testify, (2) the length of discussion about the topic, and (3) whether the jurors were reminded not to consider the decision not to testify. (*Id.* at pp. 409–410.) We need not, and do not, decide whether *Solorio's* lens is necessarily the proper one in reviewing for prejudicial comments on a defendant's failure to testify—because the Supreme Court has concluded in several cases, not materially different from the instant one, that such comments are not prejudicial.

In *Leonard,* for example, "according to two juror affidavits presented by defendant . . . , the jury discussed defendant's failure to testify during its deliberations. Juror No. 5 declared: 'During penalty phase deliberations, several jurors, myself included, expressed the opinion that we would have liked for [defendant] to testify during the penalty phase so that we could better understand why he killed six people, and whether he was truly remorseful.' Juror No. 12, the foreperson, declared: 'During the penalty phase deliberations, jurors, myself included, discussed the fact that we would like to have heard

[defendant] testify during the penalty phase so that we could better know him and understand the extent of his impairment. We discussed the fact that we would have liked to have heard [defendant's] reasons for committing the crimes as we felt this was not satisfactorily answered through the testimony of defense expert witnesses.' " (*Leonard, supra,* 40 Cal.4th at p. 1424.)

Although the jurors had engaged in misconduct, the Supreme Court concluded the defendant had not been prejudiced by the comments. The high court explained: "[T]he purpose of the rule prohibiting jury discussion of a defendant's failure to testify is to prevent the jury from drawing adverse inferences against the defendant, in violation of the constitutional right not to incriminate oneself. Here, the comments on defendant's failure to testify mentioned in defendant's new trial motion merely expressed regret that defendant had not testified, because such testimony might have assisted the jurors in understanding him better. In the words of the trial court: 'I think that wanting to hear defendants testify is natural. We do the best we can to deter jurors from speculating and from drawing negative inferences, but merely referencing that they wish he would have testified is not the same as punishing the Defendant for not testifying. It is not the same as drawing negative inferences from the absence of testimony.' We conclude there is no substantial likelihood that defendant was prejudiced by the jury's brief discussion of his failure to testify at the penalty phase." (*Leonard, supra*, 40 Cal.4th at p. 1425.)

In *Avila, supra,* 46 Cal.4th 680, the prosecution and defendant stipulated to a hearing on juror comments about defendant's failure to testify. (*Id.* at p. 725.) Some of the jurors testified such comments were made only after deliberations ended and a verdict was returned. Another juror testified a comment was made at the beginning of the guilt phase deliberations, but another juror had said at the time that was not to be considered. And yet another juror testified that during a break at the end of the guilt phase deliberations, a juror had commented to the effect, " 'If it had been me, I would have got[ten] on the stand to defend myself,' " and another juror had said, " 'Yeah, me too.' " But again, at the time, another juror had commented " 'we were told that's not supposed to be considered.' " (*Id.* at pp. 725–726.) These comments were, indeed, misconduct,

but the Supreme Court again concluded the defendant had not been prejudiced. (*Id.* at pp. 726–727.) That "only two jurors recalled that any juror had commented on defendant's failure to testify indicates that the discussion was not of any length or significance." (*Id.* at p. 727.) In addition, "the offending juror was immediately reminded he could not consider this factor and the discussion ceased." (*Ibid.*) Further, " '[t]ransitory comments of wonderment and curiosity' about a defendant's failure to testify, although technically misconduct, 'are normally innocuous, particularly when a comment stands alone without any further discussion.' " (*Ibid.*)

In *People v. Manibusan* (2013) 58 Cal.4th 40 (*Manibusan*), the defendant submitted a juror declaration which stated in relevant part: "(1) 'The fact that the defendant did not testify came up during deliberations' and (2) 'It was the general consensus of the jury that if the defendant testified he would subject himself to damage by the prosecutor's questions.' " (*Id.* at p. 58.) He also submitted an investigator's declaration which stated in relevant part: "(1) Juror No. 58 'told [the investigator] that jurors talked about the fact the defendant did not testify' and (2) Juror D.S. 'stated that jurors discussed the fact that defendant . . . did not testify.' " (*Id.* at p. 59.) The Supreme Court first disregarded the investigator's declaration as hearsay. (*Ibid.*) It also disregarded the juror's declaration to the extent it purported to discuss the jury's deliberative process. (*Ibid.*) But to the extent the juror's declaration indicated jurors had "discussed defendant's failure to testify, it [was] admissible to establish misconduct that raise[d] a presumption of prejudice." (*Ibid.*) However, the high court again concluded the misconduct had not caused the defendant "actual harm." (*Ibid.*) The court reiterated, " '[i]t is natural for jurors to wonder about a defendant's absence from the witness stand. [Citation.]' (*People v. Loker* (2008) 44 Cal.4th 691, 749 . . . ; see *People v. DeShannon* (1970) 11 Cal.App.3d 982, 988 . . . ['Every lawyer, indeed anyone with common sense, knows that . . . individual jurors do wonder why a presumably innocent defendant does not testify.'].)" (*Manibusan*, at p. 59.) "The statement that defendant's failure to testify 'came up' suggests that any comments about this subject were merely brief and passing observations, and the record offers no basis for concluding otherwise. Moreover, because

defendant showed neither 'a strong possibility' that prejudicial misconduct occurred nor 'a material conflict' that could only be resolved at a hearing, the trial court did not abuse its discretion in declining to hold an evidentiary hearing on this issue." (*Id.* at pp. 59–60.)

In *Lavender, supra*, 60 Cal.4th 679, the defendant submitted "declarations from three jurors. Juror No. 4 stated that 'the fact that the defendants did not testify was discussed at length during the deliberations and also played a large part in our decision. We discussed the fact that if the [defendants] were innocent then they should've testified.' Juror No. 9 stated that '[s]everal jurors also discussed the fact that the Defendants did not testify in this case.' Juror No. 10 stated that '[t]here was no testimony from the defendants and we discussed this fact during the deliberations and openly talked about why they did not testify and that this fact made them appear guilty to us. [¶] There was not enough testimony from defendants' witnesses. The jurors discussed that the defendants should have provided more witnesses, including themselves, to testify on their behalf.' " (*Id.* at pp. 683–684.) There was also evidence the foreperson " 'immediately admonished that juror that [they] could not consider that issue' and 'there was no further mention' of it." (*Id.* at p. 681.)

Even though the juror declarations in *Lavender* recounted egregious misconduct, the Supreme Court reversed the Court of Appeal's determination there had been "categorical[]" prejudice and remanded for a hearing in the trial court and further consideration of the evidence in support of, and in opposition to, the defendant's new trial motion. Thus, even in the face of relatively egregious misconduct, the court did not foreclose a conclusion that such misconduct did not result in actual harm to the defendant. (*Lavender, supra*, 60 Cal.4th at p. 681–682.)

The high court pointed out that "a reminder to the jury of the court's instructions to disregard a defendant's decision not to testify is, in the absence of objective evidence establishing a basis to question the effectiveness of the reminder (see Evid. Code, § 1150), strong evidence that prejudice does not exist." (*Lavender, supra*, 60 Cal.4th at p. 687.) Accordingly, the "likelihood that comments drawing inappropriate inferences from a defendant's decision not to testify pose an increased 'chance of prejudice'

[citation] as compared to comments merely expressing curiosity about a defendant's decision[,] does not mean that an explicit reminder to the jury that this is a forbidden topic would necessarily be ineffective at dispelling the presumption of prejudice." (*Id.* at p. 689.) Furthermore, there was "no objective indication that one or more jurors was unable or unwilling to follow the court's instructions once reminded of them. [Citation.] When we talk about jury deliberations, we are talking about the conduct of human beings who are fallible. 'It's a rare jury trial in which there are no mistakes on anyone's part.' [Citation.] 'To demand theoretical perfection from every juror during the course of a trial is unrealistic.' [Citation.] Accordingly, to assume that jurors who wade into a forbidden topic in the course of deliberations can never be put right again by a reminder from the trial judge or from fellow jurors sets an unreasonably high bar for jury conduct." (*Id.* at p. 691.) "Where . . . a mistake by one or more jurors during deliberations is promptly followed by a reminder from a fellow juror to disregard a defendant's decision not to take the stand—and the discussion of the forbidden topic thereafter ceases, without any objective evidence that the reminder of the court's instructions was ineffective—the reminder tends strongly to rebut the presumption that '[t]he defendant's failure to testify may still have affected the decision of at least one of the jurors.' " (*Ibid.*)

In light of these cases, the trial court here was on solid ground in finding no prejudice inured to defendant.

The sum total of the admissible evidence provided by the juror declaration was that the jury "discussed the fact" defendant did not testify and "speculated" that was a decision made by defense counsel, and the declarant juror, himself, "speculated" that had defendant testified "it would have opened a can of worms" and "[p]erhaps" defendant "would not completely understand the question and not answer it correctly" or "[m]aybe he was just too nervous to testify."

Thus, there is no evidence any juror drew an adverse inference from defendant's failure to testify or believed his failure to take the stand indicated he was guilty. On the contrary, the juror declaration suggests, at most, " '[t]ransitory comments of wonderment and curiosity' " about the defendant's failure to testify, which "although technically

misconduct, 'are normally innocuous, particularly when a comment stands alone without any further discussion.' " (*Avila, supra*, 46 Cal.4th at p. 727; accord, *Manibusan, supra*, 58 Cal.4th at pp. 59–60; *Leonard, supra*, 40 Cal.4th at p. 1425.) Here, the innocuous comments, indeed, stand alone.

Defendant claims that because the juror stated in his declaration that he "speculated" that defendant's taking the stand would have "opened a can of worms," this reflects an adverse inference from defendant's failure to testify. This is too far of a stretch. Had the declarant juror, in fact, drawn any adverse inference, his declaration could have, and undoubtedly would have, stated exactly that. Furthermore, the elaboration the juror provided—that perhaps the defendant "would not completely understand the question and not answer it correctly" and "[m]aybe he was just too nervous to testify" —does not in any way suggest the juror drew an inference of guilt from defendant's failure to testify. Finally, as the trial court observed, the juror did not state in his declaration that he actually shared his "speculation" with any other juror. So, to that extent, the admissibility of the juror's declaration is open to considerable doubt under Evidence Code section 1150.

Defendant also complains that the trial court pointed out the juror's declaration did not state whether the topic of defendant's failure to testify came up more than once, or how long the discussion lasted, or whether any juror stated, at the time, the jurors were not to consider defendant's failure to testify. Defendant asserts this erroneously shifted the burden to him to show prejudice, rather than leaving the burden on the prosecution to rebut the presumption of prejudice. While the absence of a showing on these points could, under some circumstances, leave a presumption of prejudice unrebutted, we cannot reach that conclusion here, given the declarant juror's description of the juror "discussions." Specifically, as described by the declarant, these "discussions" consisted of nothing more than the sort of innocuous statements reflecting natural human curiosity the Supreme Court has repeatedly held are not prejudicial. (See *Manibusan, supra*, 58 Cal.4th at p. 59 ["statement that defendant's failure to testify 'came up' suggests that any comments about this subject were merely brief and passing observations"].) We also

have no doubt that had these "discussions" been anything other than as described, and had they been substantial, the declarant juror would have said so in his declaration, as jurors have done in other cases where the courts have found prejudice. (See, e.g., *Lavender, supra*, 60 Cal.4th at p. 683 [juror declarations that defendant's failure to testify was " 'discussed at length' " and " 'played a large part' " in deliberations]; *Solorio, supra*, 17 Cal.App.5th at pp. 403–404 [factual disputes in juror declarations and testimony by foreperson that jurors "repeatedly" discussed the defendant's failure to testify over the course of an hour].)

Finally, defendant maintains the trial court should have held an evidentiary hearing on the supposed "unresolved conflict" of the meaning of " 'can of worms.' " "[W]hen a criminal defendant moves for a new trial based on allegations of jury misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415; accord, *Lavender, supra*, 60 Cal.4th at p. 693.) " '[S]uch a hearing should be held only when the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact.' " (*Ibid.*) There is no such material, disputed issue here.

Contrary to defendant's assertion, *Lavender* does not compel the conclusion the trial court here abused its discretion. As we have recited, in that case, juror and investigator declarations indicated egregious misconduct. (*Lavender, supra*, 60 Cal.4th at pp. 683–685.) The foreperson, however, submitted a declaration disputing the extent of the discussions and stating the jurors had, at the time, been reminded they were not to discuss the defendant's failure to testify. (*Id.* at p. 684.) The Supreme Court reversed the Court of Appeal, which had found prejudice, and remanded the matter to the trial court for a hearing on the nature and extent of the juror's discussions and the extent of the foreperson's reminders that the jury was not to consider the defendant's failure to testify. (*Id.* at p. 692.) In short, the record in *Lavender* is profoundly different than the record here, and on this record, the trial court did not abuse its discretion in declining to hold an evidentiary hearing.

## DISPOSITION

The judgment is affirmed.

_____
Banke, J.

We concur:

_____
Margulies, Acting P.J.

_____
Sanchez, J.

A153534, *People v. Romero*